ARTICLE IX GATS COMMENTARY

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Article IX
Business Practices
1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

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CASE LAW

Request for Consultations, *Japan – Measures Affecting Distribution Services*, WT/DS/45/1, 20 June 1996; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R, 25 September 1997; Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 31 March 1998; Panel Report, *Korea – Taxes on Alcoholic Beverages,* WT/DS75/R, WT/DS84/R, 17 September 1998; Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, 14 April 1999; Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, 14 April 1999; Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999; Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, 22 October 2001; Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004.

CROSS REFERENCES

Art. VIII GATS; Telecommunications Reference Paper

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A. General

1 The connection between trade and competition has been acknowledged from the very onset of international trade relations and this acknowledgement is discernible in essentially all multilateral attempts tackling trade issues. Restrictive business practices were a central element of the negotiations of the Havana Charter for an International Trade Organization (ITO) in 1947-1948,[1] where an entire chapter (Chapter V) was devoted to "business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control."[2]

2 The Havana Charter did not however come into force and the precious survivor of the aborted ITO project, the GATT 1947,[3] did not include any binding rules on restrictive business practices. The subsequent 1960 Decision on restrictive business practices,[4] while recognizing that such activities "may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions",[5] provided only for *ad hoc* notifications and consultation mechanisms.

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1 United Nations Conference on Trade and Developemnt, Havana Charter for an International Trade Organization, 1948, UN document E/Conf. 2/78, 1948.

2 *Ibid.* at Article 46:1. See also Article 46:3 for a non-exhaustive list of practices deemed to be restrictive.

3 General Agreement on Tariffs and Trade of 30 October 1947, annexed to the Final Act of the United Nations Conference on Trade and Employment, Havana 1947 (entered into force 1 January 1948; subsequently rectified, amended, or modified by the terms of legal instruments, which have entered into force before the date of entry into force of the WTO Agreement).

4 Restrictive Business Practices: Arrangements for Consultations, Decision of 18 November 1960, BISD 9S/28. See also Restrictive Business Practices: Arrangements for Consultations, Report of Experts, 2 June 1960, L/1015, BISD 9S/170.

5 *Ibid.* Decision of 18 November 1960, at Recital 2.

3 With the creation of the World Trade Organization (WTO),[6] while no comprehensive framework addressing restrictive business practices was adopted, there are pertinent rules scattered within the entire body of the WTO law.[7] The focus here is on Article IX GATS, which is a companion to Article VIII GATS. Considering the lack of legal practice on this provision, the guidelines elaborated in related disciplines are applied *mutatis mutandis* for the interpretation of Article IX. In the realm of the WTO, one can in particular benefit from the efforts of the Working Group on the Interaction between Trade and Competition Policy (WGTCP),[8] which had as its task to "study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework".[9] Also, the experience gathered from further-reaching and more fine-grained commitments under GATS, such as most notably the Reference Paper for Basic Telecommunications Services, can be applied.

4 Outside the realm of the WTO, restrictive business practices have continuously received attention in the inter-governmental frameworks of the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD), which have adopted a variety of non-binding legal instruments.[10] These instruments, as well as the law and practice of the European Community (EC) in the field of competition, may also be employed for clarifying Article XI GATS, however under a *mutatis mutandis* condition due to the essentially non-binding nature of UNCTAD and OECD rules, and the regionally-bound character of EC law.

B. The Scope of the Article XI (Paragraph 1)

I. Relationship to Article VIII: Delineating the Scopes of Application

5 In order to properly define the scope of application of Article IX GATS, it may briefly be reiterated where the lines of Article VIII lie, since **Article IX's ambit is specified in a negative manner to apply to business practices "other than those falling under Article VIII"**. The latter provision covers specifically activities of monopoly and exclusive service suppliers, who owe their position in the market to some sort of government facilitation in the form of establishment, authorisation or

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6 Agreement Establishing the World Trade Organization with Understanding on the Rules and Procedures Governing the Settlement of Disputes and Trade Policy Review Mechanism, Marrakesh, 15 April 1994, (1994) 33 ILM 15, entered into force 1 January 1995.

7 See e.g. Articles 8, 31(c) and (k), 40 TRIPs and Article 9 TRIMs. See also *R. Weinrauch*, Competition Law in the WTO, 2004, at 131-150 and The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation and Transparency, Background Note by the Secretariat, WT/WGTCP/W/114, 14 April 1999.

8 See WTO, Singapore Ministerial Declaration, Conf. Doc. WT/MIN(96)/DEC/W, 13 December 1996. On the development since Singapore, see *P. Marsden*, A Competition Policy for the WTO, 2003, at 59 *et seq.*

9 Singapore Ministerial Declaration, *ibid.* at para. 20.

10 For an overview, see Restrictive Business Practices and Trade in Services, Note by the Secretariat, MTN.GNS/W/99, 25 April 1990, at 1-4.

maintenance, either formally or in effect.[11] With the expanding liberalisation endeavours of diverse service sectors, however, government-mandated monopolies or exclusive service suppliers in the sense of Article VIII:4 are gradually disappearing and are widely replaced by suppliers holding dominant positions in the world markets.[12] The scope of Article IX GATS is wider than the one of Article VIII[13] and able to catch precisely such activities of service suppliers, who maintain dominant position or collude in services markets **but do not have a special status granted by the State**. **While the scope of Article IX is much broader, its disciplines are significantly weaker than those of Article VIII GATS and encompass only consultation and information-sharing obligations.**[14]

II. "Certain Business Practices" that "May Restrain Competition"

1. Introduction

6 The general language of paragraph 1 of Article IX GATS regarding "certain business practices of service suppliers" allows for an inclusive interpretation that could expand to literally any such practices of service suppliers[15] that may somehow "restrain competition". In that sense, the scope of Article IX does not correspond precisely to any competition law framework existing under Members' national regimes.[16] Indeed, **Article IX does not impose any obligation upon Members to actually maintain a domestic competition regulation**.[17] Regardless of the latter condition, Article IX continues to apply to practices of Members' service suppliers, as long as these have an effect restraining competition and restricting trade in services.

7 Practices restraining competition are normally referred to as **"restrictive business practices"**,[18] although this notion largely coincides with the standard concept of "anti-competitive practices", which are found to be against the existing national competition law rules. The UN Set of Multilaterally Agreed Principles and Rules for

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11 Article XXVIII(h) GATS defines "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service". For an extensive analysis, see the commentary on Article VIII GATS.

12 See *A. Mattoo*, Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services", in: *T. Cottier & P. C. Mavroidis* (eds.), State Trading in the Twenty-First Century, 1998, 37-70, at 44.

13 *Ibid.* at 59.

14 See *supra* Section C.

15 For a definition of "service supplier", see the commentary on Article VIII GATS.

16 See Overview of Members' National Competition Legislation, Note by the Secretariat, WT/WGTCP/W/128/Rev.2, 4 July 2001.

17 The provision of GATS Article IX is in this context similar to that of Article XII of the Montevideo Protocol on Trade in Services of MERCOSUR (Montevideo, 15 December 1997; Mercosur/GMC/Dec. No 12/98). In the framework of MERCOSUR, however, the Defense of Competition Protocol (Protocolo de Defensa de la Competencia del Mercosur, Fortaleza, 17 December 1996; Mercosur/CMC/Dec. No 18/96) mandates all members to maintain autonomous national competition agencies and establishes a formal mechanism for cooperation among these. See *M. Lee & Ch. Morand*, Competition Policy in the WTO and FTAA: A Trojan Horse for International Trade Negotiations?, 2003, 20-21.

18 See e.g. Restrictive Business Practices and Trade in Services, *supra* note 10.

the Control of Restrictive Business Practices[19] defines "restrictive business practices" as **"acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same effect".**[20]

8 While the stress on developing countries is missing from the provision of Article IX GATS, the concept of "certain business practices" that "may restrain competition", "thereby restrict[ing] trade in services" is identical with that of the UN Principles and Rules. It should however be borne in mind that the latter apply to both goods and services, while Article IX is explicitly directed at services only.

2. Typology of Restrictive Business Practices

9 This section contains a brief overview of the categories of business acts and/or behaviour that may be deemed anti-competitive under national competition law regimes[21] and may equally be considered "restrictive business practices", and are thus likely to fall within the ambit of Article IX GATS.

10 It is important to bear in mind that some anti-competitive practices discussed below, such as cartels, are mainly subject to *ex post* review, while others, such as, above all, mergers and acquisitions, to *ex ante* review. The language of Article IX, i.e. "business practices […] [that] *may* restrain competition",[22] **implies that both types of anti-competitive practices subject to *ex ante* and *ex post* control will be covered by it**, although in the former case the anti-competitive effects might only materialise in the future.

a) Horizontal Agreements

11 "Horizontal agreements are referred to implicit or explicit arrangements between firms competing with identical or similar products in the same market."[23] They consist of two broad categories. The first one encompasses the so-called **"hard core" cartels**, which are considered a grave violation under all competition law regimes and include anti-competitive practices, such as price-fixing, limiting output or dividing markets. Such agreements are normally prohibited *per se* under domestic competition law regimes.[24] Hard core cartels, in particular "export cartels",[25] have

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19 United Nations, Resolution 35/63 adopted by the General Assembly at its 35th Session, 5 December 1980, which incorporated the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictve Business Practices, TD/RBP/CONF/10/Rev.1 (hereinafter the *UN Principles and Rules*).

20 UN Principles and Rules, *ibid.* at Section B, para. 1.

21 See e.g. WTO, Trade and Competition Policy, in: Annual Report 1997, Vol.1, 30-91, at 40-42. For an account of different national competition law regimes, see *R. Whish*, Competition Law (5th ed.), 2003, at 57 *et seq.*

22 Emphasis added.

23 Trade and Competition Policy, *supra* note 21, at 40.

24 See e.g. Article 81(1) EC Treaty. Under EC law, the provisions of such agreements contrary to Article 81(1) are

been continuously identified as causing significant adversary effects on international trade and demanding an international effort.[26]

12 The second class of horizontal agreements are such that, besides their anti-competitive effects, may also incur some efficiency gains in the form of improved production or distribution, promotion of technical or economic progress. Such agreements may be "exempted" from the *per se* prohibition either on an individual basis, when the positive gains outweigh the negative ones or through the so-called "block exemptions" contained in some competition law regimes, which provide limited exception for certain type of agreements.[27]

13 Such agreements may include R&D joint ventures and consortia, and co-operative arrangements for product standard setting procedure. With regard to the latter, concern has been raised that certain standard setting procedures in the context of tourism services may be competition restraining and trade restrictive under Article IX GATS.[28]

b) Vertical Agreements

14 Vertical agreements are struck between undertakings involved in different successive stages of the production, distribution and marketing chain. They include practices such as exclusive dealing, exclusive territories, tying arrangements and resale price maintenance. For most vertical restraints, competition concerns can arise if "there is insufficient inter-brand competition, i.e. if there is some degree of market power at the level of the supplier or the buyer or at both levels".[29]

15 Since vertical agreements often generate efficiency gains, they are not *per se* prohibited and are considered by competition authorities on a case-by-case basis applying a rule of reason.[30] Vertical agreements, especially exclusive distribution and supply arrangements, are deemed one of the barriers for foreign products in obtaining market access. The request for consultations *Japan – Measures Affecting Distribution Services*,[31] regarded such restraints, in particular the **vertically integrated distribution** through the operation of the Japanese Large-Scale Retail Store Law, which regulated floor space, business hours and holidays of

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considered void. See Article 81(2) EC Treaty; Case 56/65 *Société Minière v Maschinenbau Ulm* [1966] ECR 235; Case 319/82 *Soc. De Vente de Coments et Bétons v. Kerpen & Kerpen* [1983] ECR 4173.

25 See Trade and Competition Policy, *supra* note 21, at 63-65.

26 See Report [2002] of the Working Group on the Interaction between Trade and Competition Policy, [WT/WGTCP/6], at 17-22. See also OECD, Council Recommendation Concerning Effective Action against Hardcore Cartels, C/M(98)7/PROV, 25 March 1998.

27 See e.g. in the EC context, Council Regulation (EC) 772/2004 on the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, OJ L 123/11, 27 April 2004.

28 See *X. Font & J. Bendell*, Standards for Sustainable Tourism for the Purpose of Multilateral Trade Negotiations, 2002, 19-20.

29 European Commission, Guidelines on Vertical Restraints, OJ C 291/1, 13 October 2000, at para. 6.

30 See Trade and Competition Policy, *supra* note 21, at 41.

31 *Japan – Measures Affecting Distribution Services*, Request for Consultations by the United States, WT/DS/45/1, 20 June 1996. See also *Japan – Measures Affecting Distribution Services*, Request for Further Consultations by the United States, WT/DS/45/1/Add.1, 26 September 1996.

supermarkets and department stores. The US claimed that through this act, the Japanese wholesale and retail distributors were linked in such a way that had an exclusionary effect on foreign distribution service suppliers.[32] The US did not however pursue the case against under GATS but followed instead a GATT non-violation case with a particular regard to photographic film and paper,[33] "even though it would arguably have been easier for it to establish a GATS violation case".[34]

c) Abuse of Dominant Position

16 Dominant positions are not banned *per se* under most national competition law regimes.[35] However, the **practices of a dominant firm to abuse its position in the relevant market** are held to be against national competition rules. Such practices may include exclusive dealing, tying, refusal to supply (including control over essential facilities), price and non-price predation, price discrimination or excessive pricing.[36] Of particular concern in the WTO context are those abuses, which have an **"exclusionary effect or otherwise limit effective competition from foreign firms"**.[37]

17 The finding of an abuse of dominant position is a complex exercise that normally involves thorough economic analyses to define the relevant product/service market, the geographic market and the competitive constraints upon the undertaking (or undertakings) under scrutiny. The assessment of dominance does not simply follow from the firm's market share or the industry's concentration but involves also a consideration of barriers to entry, innovation and emergence of new markets, and demands an examination on a case-by-case basis.

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32 The United States considered that the Government of Japan failed to carry out its obligations and specific commitments under Articles III and XVI GATS. The United States also considered that these measures nullify or impair benefits accruing to the United States under the GATS, within the meaning of Article XXIII:3. See also *W. Zdouc,* WTO Dispute Settlement Practice relating to the GATS, in: JIEL 2 (1999), at 301.

33 Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 31 March 1998. The Panel found that the US had not demonstrated that the Japanese measures nullified or impaired, either individually or collectively, benefits accruing to the US within the meaning of GATT Article XXIII:1(b). Neither were the Japanese distribution measures found to accord less favourable treatment to imported photographic film and paper within the meaning of Article III:4, nor that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.

34 *W. Zdouc, supra* note 32.

35 See, for instance, Article 82 of the EC Treaty.

36 See Trade and Competition Policy, *supra* note 21, at 42. Article 82 of the EC Treaty, which addresses abuse of dominance offers the following non-exhaustive list of abuses: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

37 Submission by the European Community and its Member States, the Working Group on the Interaction between Trade and Competition Policy (97-5153), 24 November 1997, at 6.

d) Mergers

18 Mergers may be categorised into horizontal,[38] vertical[39] and conglomerate.[40] From the national perspective, competition authorities review merger transactions *ex ante* to examine whether the ability of the new entity to exercise market power would substantially increase and thereby would significantly impede effective competition.[41]

3. Some Insights from the Panel Report *Mexico – Telecommunications Services*

a) *Mexico – Telecommunications Services* on the Meaning of "Anti-Competitive Practices"

19 While the above typology reflects above all the concept of anti-competitiveness in national legal regimes, the Panel Report *Mexico – Telecommunications Services*,[42] interpreted the meaning of "anti-competitive practices" in the context of the Reference Paper, which forms part of the commitments made by multiple WTO Members in the realm of basic telecommunications services.[43] Some of the conclusions of this Panel may be of interest in the context of Article IX GATS, insofar as they reveal the approach of the Panel towards practices that may restrain competition.

20 The Reference Paper aims in particular at preventing anti-competitive practices of major suppliers[44] in basic telecommunications markets. As such anti-competitive practices, it lists (i) cross-subsidisation; (ii) use of information obtained from competitors with anti-competitive results and (iii) "not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services".[45] It is notable in the context of Article IX that **the Panel interpreted widely the concept of "anti-competitive practices"** and considered the above list *not* exhaustive.[46]

21 The Panel concluded that, "the term 'anti-competitive practices' is broad in scope,

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38 Horizontal mergers are these between two or more underatkings in the same line of business.

39 Vertical mergers bring together underatkings that are involved in different stages of production and marketing within an industry.

40 Conglomerate mergers intergrate undertakings in unrelated lines of business.

41 See e.g. in the EC context, Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1, 29 January 2004, at Article 2.

42 WTO Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004 (hereinafter *Mexico – Telecommunications Services*).

43 These commitments have been attached to the Fourth Protocol, which forms an integral part of GATS. See WTO, Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 30 April 1996.

44 For a definition of "major supplier", see Reference Paper, at "Definitions", para. 3. For interesting details of the negotiating history of the "major supplier" definition, see *P. Marsden*, *supra* note 8, at 229-230.

45 Reference Paper, at Section 1. On the interpretation of the concept of "anti-competitive practices", see WTO Panel Report, *Mexico – Telecommunications Services*, at paras 7.229-7.245.

46 *Mexico – Telecommunications Services*, at para. 7.232.

suggesting actions that lessen rivalry or competition in the market".[47] The Panel went on to state that the "first example – on cross-subsidization – indicates that 'anti-competitive practices' may also include *pricing actions* by a major supplier. All three examples show that 'anti-competitive practices' may also include action by a major supplier *without collusion or agreement* with other suppliers. Cross-subsidization, misuse of competitor information, and withholding of relevant technical and commercial information are all practices which a major supplier can, and might normally, undertake on its own".[48] It was further established that the concept of "anti-competitive practices" encompasses *horizontal coordination*, i.e. between undertakings operating at the same level of production, distribution or sale,[49] as examined in the light of the definition of "major supplier" and Section 1.1 of the Reference Paper.[50]

22 It is noteworthy that the *Mexico – Telecommunications Services* Panel based its analysis upon the Members' own competition legislation but **recognised further that, "the meaning of 'anti-competitive practices' is informed by related provisions of some international instruments that address competition policy"**.[51] It referred in particular to the already mentioned international instruments embodies in the Havana Charter, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,[52] as well as the OECD Council Recommendation Concerning Effective Action against Hardcore Cartels.[53] The panel also referred to the work of the WTO Working Group on the Interaction between Trade and Competition Policy. **By analogy, one could deem all of these documents in addition to other similar international instruments (especially when both parties to the dispute are members) of relevance to Article IX GATS, when interpreting restrictive business practices**.[54]

b) *Mexico – Telecommunications Services* on Whether Practices Required under a Member's Law Can Be Anti-Competitive

23 A final helpful insight from the Panel decision in *Mexico-Telecommunications Services*, comes from its finding that, **practices required under a member's law can also be anti-competitive**.[55] Making reference to Article 27 of the Vienna Convention of the Law of Treaties, the Panel concluded in this regard that, "a requirement imposed by a Member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent

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47 *Ibid.* at para. 7.230.

48 *Ibid.* at para. 7.232 (emphasis in the original).

49 See *supra* Section 2(a).

50 *Ibid.* at paras 7.234-7.238.

51 *Ibid.* at para. 7.236.

52 *Supra* note 19.

53 *Supra* note 25.

54 It must be noted however that the methodology of the Panel has been subject to cricism. See e.g. *P. Marsden*, "WTO Decides First Competition Case – With Disappointing Results" (2004) Competition Law Insight, 3-9.

55 *Mexico – Telecommunications Services*, at paras 7.239-7.245.

major suppliers from 'continuing anti-competitive practices'".[56] **In light of the above and with respect to Article IX GATS, it is apparent that Members cannot justify restrictive business practices of their service suppliers by simply invoking their national laws and regulations.**

24 Finally, while the above typology of restrictive business practices provides a useful overview of the various activities likely to fall within the ambit of Article IX GATS, it should be borne in mind that **whether an alleged practice is restrictive or not is not in itself a precondition to trigger the consultations procedures as contained in paragraph 2. The request of a Member to that effect will suffice. The restrictiveness of the alleged practices will then be part of the consultation and information-sharing process.**

III. Trade Restrictiveness of Business Practices Restraining Competition

25 The restraining of competition and the trade restrictiveness of certain business practices are formulated in Article IX GATS as **cumulative conditions**. The latter element is likely however to be **interpreted broadly**. The UN Principles and Rules, for instance, speak widely of practices "having or being likely to have adverse effects on international trade".[57] The EC has also applied a broad concept in the context of inter-state trade effect and defined it as "actual, potential, direct or indirect effect on the pattern of trade between Member States".[58]

26 Domestic competition law regimes contain normally the so-called ***de minimis* rules**,[59] whereby anti-competitive activities of minor importance (due to the small market share of the undertakings involved[60]; the minimal aggregate turnover of the merging undertakings[61]) are not taken into consideration. The trade restrictiveness of such practices may equally be deemed negligible within the context of Article IX GATS.

27 Finally, it should be borne in mind that there are limitations to market access and national treatment within GATS,[62] which accordingly limit the scope of Article IX: **Only those trade restrictive activities of service suppliers are of concern to Article IX, which have an effect in a service market with regard to which the Member had made specific commitments**.[63] Practices, which negatively affect "non-

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56 *Ibid.* at para. 7.244.

57 UN Principles and Rules, at Section D, para. 3.

58 The test was first stated in Case 56/65 *Société Technique Minière v. Maschinenbau Ulm, supra* note 24. See also European Commission, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27 April 2004.

59 The *de minimis* doctrine was established by the European Court of Justice with Case 5/69 *Völk v. Vervaecke* [1969] ECR 295, [1969] CMLR 273. See also Commission Notice on Agreements of Minor importance Which Do Not Appreciably Restrict Competition under Article 81(1) of the Treaty Establishing the European Community *(de minimis)*, OJ C 368/13, 22 December 2001.

60 See *ibid.* at paras 7-9.

61 See in the EC context, Council Regulation No 139/2004, *supra* note 41, at Article 1.

62 Articles XVI and XVII GATS.

63 The general GATS obligations, as formulated in Part II GATS, are supplemented by specific commitments

scheduled" services sectors, would arguably not be within the reach of Article IX GATS, unless they somehow have an effect on a committed services sector.

C. Disciplines (Paragraph 2)

I. Introduction: Soft Law *versus* Hard Law Approach

28 Paragraph 2 of Article IX GATS contains weak disciplines with a mixture of soft law and hard law language. Soft law in this context means disciplines the enforcement of which cannot be subject to dispute settlement mechanism.[64] As will be seen below, however, the significance of such a differentiation for paragraph 2 is minimal, since its hard law provisions do not go beyond a duty to consultation and information sharing.

II. A Duty to Consult (Article IX:1)

29 Pursuant to paragraph 2 of Article IX, the Member whose service suppliers act in a manner restraining competition **has the duty to enter into consultations** upon request "with a view to eliminating practices referred to in paragraph 1". This however involves **no duty of the Member to eliminate the restrictive business practices** subject to consultation. The legal obligation is limited to entering into consultations at the request of the other party.

30 Consultation is also the first stage in the WTO dispute settlement procedure, which aims at resolving disputes cooperatively. There are generally two types of provisions regarding consultation in WTO law: (i) the ones provided in Article 4 DSU, which, *inter alia*, sets consultation as a pre-requisite for the right of Members to request the establishment of a panel; and (ii) consultation provisions in the covered agreements, as defined by note 4 of Article 4.11 DSU.

31 Article XXIII:I GATS explicitly obliges Members to accord sympathetic consideration to, and adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. It adds further that the DSU is to apply to such consultations.

32 In this line of reasoning, the **DSU provisions on consultation, particularly the procedural rules stipulated in Article 4**, insofar as they are of relevance, would also **apply to Article IX:2 GATS.**

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accepted by individual Members in the Schedules of Specific Commitments appended to the GATS. The schedules show the positive commitments of a Member with regard to national treatment and market access according to the modes of supply identified in Article I GATS, and the conditions, terms and limitations of these commitments. See also the commentaries on Articles XVI, XVII and XX GATS.

[64] For instance, most of the WTO provisions on Special and Differential Treatment are soft law provisions. See e.g. Article IV GATS, Article 10.1 SPS.

III. Good Faith in Consultations (Article IX:2)

33 Paragraph 2 of Article IX GATS provides further for according **"full and sympathetic consideration to such a request"**. This provision is an expression of the "good faith" principle of public international law,[65] which is key to its proper functioning.[66]

34 The DSU contains language similar to GATS Article IX: Article 4.3 thereof provides that, "the Member to which the request is made, […] shall enter into consultations in good faith […] with a view to reaching a mutually satisfactory solution". Article 3.10 DSU provides further that, "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute".[67]

35 Breaching good faith obligations in the DSU context may have the effect of limiting the Member's right to establish a panel according to Article 4.3.[68] **With regard to Article IX GATS however, such a breach would not have a significant practical effect, since there are no concrete rights or obligations of Members.** One can construe some residual effect of an action contrary to the good faith principle with regard to Members' obligation to provide information.

IV. Information Provision and Safeguarding Confidentiality (Article IX:3)

36 In the consultation process, the Member addressed is obliged to co-operate through supply of information. The obligation for information sharing can be divided into two categories. The first one is the obligation **to provide publicly available non-confidential information of relevance to the matter in question**. In the absence of addressing the issue of who determines which information is relevant to the matter, it would be for the providing Member to decide upon this relevance, doing so in the spirit of cooperation in good faith. The requesting Member may ask for additional documentation, which is to its knowledge existing, non-confidential and relevant.

37 The second obligation is **to provide confidential information**. The latter is **limited** however by the relevant domestic rules of the providing Member, as well **conditional upon** the conclusion of a satisfactory agreement concerning the safeguarding of confidentiality by the requesting Member. This leaves substantial leeway for the providing Member, which not being bound by specific procedural rules,[69] may deny or delay indefinitely the flow of information by claiming

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65 See e.g. *Marion Panizzon*, Good Faith in the Jurisprudence of the WTO, 2006.

66 See e.g. International Court of Justice, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974 [1974] ICJ 253; *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974 [1974] ICJ 457.

67 See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 September 1997; Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, 17 September 1998; Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999.

68 See Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, 22 October 2001.

69 See Article 18.2 DSU. See also Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, 14 April 1999, Annex 1 and Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, 14 April 1999, Annex 1.

insufficient safeguarding of confidentiality or by requesting specific and/or elaborate preconditions in its domestic regulation.

D. Evaluation and Outlook

38 Article IX GATS is a soft, consultation norm, which translates into GATS and thus makes applicable to services, the 1960 GATT Contracting Parties Decision on Restrictive Business Practices. Despite its minimal obligations, it still provides a valuable forum for addressing contentious issues with regard to restrictive business practices and enhances co-operation.

39 It does not however provide a satisfactory solution to the various problems related to restrictive business practices in services markets and Members are likely to search other more effective possibilities going beyond Article IX GATS and to develop alternative disciplines similar to the Annex on Telecommunications or the Reference Paper[70] (in particular, considering the aborted WTO efforts in the field of competition policy[71]).

40 Further clarification on restrictive business practices and specifically on Article IX GATS may stem from the efforts in the framework of the **Work Programme on Electronic Commerce**,[72] which aims at examining "all trade-related issues relating to global electronic commerce"[73] and has defined an according mandate for the Council for Trade in Services.[74]

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70 An approach suggested by Mattoo with regard to Article VIII GATS. See *Mattoo*, *supra* note 12, at 55-58.

71 Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, WT/L/579, 2 August 2004, at para. (g).

72 Work Programme on Electronic Commerce, Adopted by the General Council on 25 September 1998, WT/L/274, 30 September 1998.

73 *Ibid.* at para. 1.1.

74 *Ibid.* at para. 2.1. See also Work Programme on Electronic Commerce, Interim Report to the General Council, S/C/8, 31 March 1999, at 9.